

Judge Berman

08 CV 4849

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
Jose BARRAGAN ESTRADA (A 88 260 353),
Laura SANCHEZ PULIDO (A 88 260 352), and
Laura BARRAGAN SANCHEZ (A 88 260 351),

Petitioners

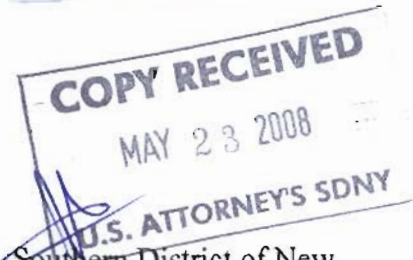
-against-

DEPARTMENT OF HOMELAND SECURITY,
THE UNITED STATES CITIZENSHIP & IMMIGRANT
SERVICES and the FEDERAL BUREAU OF
INVESTIGATION,

Respondents .

-----X

PETITION FOR MANDAMUS



To the Honorable Judges of the United States District Court, Southern District of New York: Petitioner, Jose BARRAGAN ESTRADA (A 88 260 353), his wife Laura SANCHEZ PULIDO (A 88 260 352), and daughter Laura BARRAGAN SANCHEZ (A 88 260 351), herein petition this Court through this mandamus action to direct the Federal Bureau of Investigations (hereinafter referred to as the "FBI") and the Department of Homeland Security (hereinafter referred to as "DHS") through its branch the United States Citizenship & Immigration Service (hereinafter referred to as "USCIS") to finalize background checks and petition for permanent residence forthwith.

This action arises from the respondents' violation of Section 6 of the Administrative Procedure Act, and 5 U.S.C. §555(b), and 28 U.S.C. §1331 and 1361.

JURISDICTION

1. The Administrative Procedure Act requires that administrative agencies have a duty to decide

- issues presented to them within a reasonable time. 5 U.S.C. §555(b).
2. 28 U.S.C. §1331 confers jurisdiction on the District Courts to review actions of federal agencies. 28 U.S.C. §1331 note 48. Reviewing courts have a duty to compel agency action unreasonably delayed. Neder v. F.C.C., 50 F.2d 182, 172 U.S. App. D.C. 1, (C.A.D.C. 1975).
 3. Furthermore, 28 U.S.C. §1361 provides that “district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”
 4. Under Rule 81 of the Federal Rules of Civil Procedure, writs of mandamus are abolished: “Relief heretofore available by mandamus ... may be obtained by appropriate action or by appropriate action or by appropriate motion under the practice prescribed in these rules”.
 5. Section 279 of the Immigration and Nationality Act, 8 U.S.C. Sec 1329 confers jurisdiction upon United States District Courts for review of all cases arising under the Immigration and Nationality Act, and the Administrative Procedures Act provides for judicial review of federal administrative agencies, authorizing the court to compel agency action unlawfully withheld or unreasonably denied.
 6. Jurisdiction also lies under the United States Constitution because a benefit has been conferred to the Petitioners and the executive arm of the government is required to assure that the laws are discharged and complied with.

STATEMENT OF FACTS

7. Petitioner, Jose BARRAGAN ESTRADA (A 88 260 353), a native and citizen of United Mexican States (hereinafter referred to as “Mexico”) lived and continues to live in New Rochelle with his wife and daughter, also petitioners herein. He applied for a labor certification with the Department of Labor on April 30, 2001. On November 14, 2006 the

labor certification was approved and soon thereafter the I-140 was approved. See Exhibit "A". On February 27, 2007, Mr. Barragan, his wife and daughter, filed for adjustment of status to that of permanent residence. See Exhibit "B".

8. Mr. Barragan, his wife and daughter were interviewed pursuant to the application for permanent residence May 31, 2007. See Exhibit "C".
9. Petitioner was requested to provide additional proof of residence in the United States in December, 2000, which is a requirement for eligibility under INS §245(i). This was timely provided on June 7, 2007. See Exhibit "D".
10. Thereafter Petitioner and his family's cases have remained unfinalized. Petitioner and his counsel have sought to find out the status of the case on several occasions through inquiries to the USCIS. None of these inquiries resulted in a conclusion of the case. Following these inquiries about the case, the USCIS has provided no indication that it is willing to adjudicate these petitions.

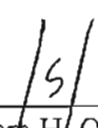
RELIEF SOUGHT

11. Petitioners face the possibility that their cases will remain unadjudicated for substantial additional time.
12. Petitioner has sought through numerous inquiries, congressional intervention and self-help to have his case finalized to no avail.
13. Petitioner has no means to compel the USCIS to complete those duties that are required of it by law. All attempts by the Petitioners to have his and his family's cases finalized have been fruitless. Mr. Barragan's father is elderly and gravely ill, and Mr. Barragan is unable to visit him until he becomes a permanent resident.

14. The USCIS and the FBI are the only agency authorized to perform adjudications and the relevant background checks, respectively, and they have failed to do so; the petitioners' petitions for adjustment of status have not been completed despite that petitioner and his family have fulfilled all the requirements of the statute and laws and are eligible to become permanent residents. There is no forum or means other than this mandamus action for petitioner to obtain relief. Because the USCIS case is "pending", petitioners cannot file any appeal within the agency itself, or an administrative appeal.
15. Further inaction could seriously harm the petitioner, as he is ineligible for numerous benefits afforded to United States permanent residents. As stated above, he can not leave the country until he becomes a permanent resident. Consequently, this administrative inertia is actionable, and the U.S. District Court has jurisdiction and the power to compel this agency's action and to compel a final adjudication of the petitioner's application. Jeffrey v. INS, 710 F. Supp. 486 (S.D.N.Y.1989), Environmental Defense Fund, Inc. v. Haden, 428 F.2d 1093, 138 U.S. App.D.C. 391(C.A.D.C. 1970).

WHEREFORE, Petitioners respectfully request through this Mandamus action that the United States Citizenship & Immigration Services and the Federal Bureau of Investigations be directed to immediately finalize the necessary background checks and grant the petitioners permanent residence.

Dated: May 21, 2008



William H. Oltarsh
Oltarsh & Associates, P. C.
Attorneys for the Petitioner
494 Eighth Avenue, Suite 1704
New York NY 10001
(212) 944-9420

U.S. Department of Labor Employment and Training Administration
Philadelphia Backlog Elimination Center
1 Belmont Avenue
Suite 220
Bala Cynwyd, PA 19004



FINAL DETERMINATION

November 14, 2006

ROCKLEDGE SCAFFOLD CORP
c/o WILLIAM H. OLTARSH
494 EIGHTH AVENUE, SUITE 1704
NEW YORK, NY 10001

ETA Case Number: P-05027-42045

Alien's Name: JOSE LUIS BARRAGAN

Occupation: Carpenter, Rough, 860381042

Date of Acceptance for
Processing: April 30, 2001

The Department of Labor has made a final determination on your Application for Employment Certification pursuant to Title 20, Code of Federal Regulations, Part 656 and as required by the Immigration and Nationality Act, as amended.

Form ETA 750 has been **certified** and is enclosed. This certified application must be attached to the I-140 petition along with any other required evidence and filed with the U.S. Citizenship and Immigration Service (USCIS). The appropriate office can be found at:

http://uscis.gov/graphics/fieldoffices/service_centers/index.htm

USCIS procedures, instructions and forms can be found at:

<http://uscis.gov/graphics/formsfee/forms/index.htm>.

Sincerely,

Barbara Shelly
Certifying Officer

CC: JEREMIAH HARRINGTON
JOSE LUIS BARRAGAN

Enclosure(s): [Form ETA 750, Parts A & B]

Exhibit "A"



RECEIPT NUMBER SRC-07-113-50495		CASE TYPE I485 APPLICATION TO ADJUST TO PERMANENT RESIDENT STATUS
RECEIVED DATE February 26, 2007	PRIORITY DATE	APPLICANT A088 260 353 BARRAGAN ESTRADA, JOSE L.
NOTICE DATE March 2, 2007	PAGE 1 of 1	
WILLIAM H. OLTARSH OLTARSH & ASSOC P C 494 EIGHTH AVE STE 1704 NEW YORK NY 10001		Notice Type: Receipt Notice Amount received: \$ 1395.00 Section: Other basis for adjustment

Receipt notice - If any of the above information is incorrect, call customer service immediately.

Processing time - Processing times vary by kind of case. You can check our current processing time for this kind of case on our website at www.uscis.gov. On our website you can also sign up to get free e-mail status updates as we complete key processing steps on this case. Most of the time your case is pending the processing status will not change because we will be working on others filed earlier. We will notify you by mail when we make a decision on this case, or if we need something from you. If you move while this case is pending, call customer service when you move. Processing times can change. If you don't get a decision or update from us within our current processing time, check our website or call for an update. If you have questions, check our website or call customer service. Please save this notice, and have it with you if you contact us about this case.

Notice to all customers with a pending I-130 petition - USCIS is now processing Form I-130, Petition for Alien Relative, as a visa number becomes available. Filing and approval of an I-130 relative petition is only the first step in helping a relative immigrate to the United States. Eligible family members must wait until there is a visa number available before they can apply for an immigrant visa or adjustment of status to a lawful permanent resident. This process will allow USCIS to concentrate resources first on cases where visas are actually available. This process should not delay the ability of one's relative to apply for an immigrant visa or adjustment of status. Refer to www.state.gov/travel to determine current visa availability dates. For more information, please visit our website at www.uscis.gov or contact us at 1-800-375-5283.

If this receipt is for an I-485, or I-698 application - USCIS WILL SCHEDULE YOUR BIOMETRICS APPOINTMENT. You will be receiving a biometrics appointment notice with a specific time, date and place where you will have your fingerprints and/or photos taken. You MUST wait for your biometrics appointment notice prior to going to the ASC for biometrics processing. This I-797 receipt notice is NOT your biometrics appointment notice and should not be taken to an ASC for biometrics processing.

WHAT TO BRING TO YOUR BIOMETRICS APPOINTMENT-

Please bring your biometrics appointment letter (with specific time, date and place where you will have your fingerprints and/or photo taken) AND your photo identification to your biometrics appointment.

Acceptable kinds of photo identification are: a passport or national photo identification issued by your country, a drivers license, a military photo identification, or a state - issued photo identification card.

Always remember to call customer service if you move while your case is pending. If you have a pending I-130 relative petition, also call customer service if you should decide to withdraw your petition or if you become a U.S. citizen.

This receipt notice provides notification of the date that your application/petition was received by USCIS. This receipt notice does NOT grant any immigration status or benefit. You may not present this receipt notice as evidence that you have been granted any immigration status or benefit. In addition, this receipt notice does not constitute evidence that your application remains pending with USCIS i.e., that a decision to grant or deny your application/petition has not yet been made. The current status of your application/petition must be verified with USCIS.

Please see the additional information on the back. You will be notified separately about any other cases you filed.

IMMIGRATION & NATURALIZATION SERVICE
TEXAS SERVICE CENTER
P O BOX 851488 - DEPT A
MESQUITE TX 75185-1488
Customer Service Telephone: (800) 375-5283



Exhibit "B"

THE UNITED STATES OF AMERICA

RECEIPT NUMBER SRC-07-113-50455		CASE TYPE 1140
RECEIPT DATE March 1, 2007		IMMIGRANT PETITION FOR ALIEN WORKER
PRIORITY DATE April 30, 2001	PETITIONER April 24, 2007	
NOTICE DATE April 24, 2007	PAGE 1 of 1	BENEFICIARY A088 260 353 BARRAGAN ESTRADA, JOSE L.
WILLIAM H. OLTARSH OLTARSH & ASSOC P.C 494 EIGHTH AVE STE 1704 NEW YORK NY 10001		Notice Type: Approval Notice Section: Skilled Worker or Professional, Sec.203(b)(3)(A)(i) or (ii)

The above petition has been approved. The petition indicates that the person for whom you are petitioning is in the United States and will apply for adjustment of status. He or she should contact the local INS office to obtain Form I-485, Application for Permanent Residence. A copy of this notice should be submitted with the application, with appropriate fee, to this Service Center. Additional information about eligibility for adjustment of status may be obtained from the local INS office serving the area where he or she lives, or by calling 1-800-375-5283.

If the person for whom you are petitioning decides to apply for a visa outside the United States based on this petition, the petitioner should file Form I-824, Application for Action on an Approved Application or Petition, with this office to request that we send the petition to the Department of State National Visa Center (NVC).

The NVC processes all approved immigrant visa petitions that require consular action. The NVC also determines which consular post is the appropriate consulate to complete visa processing. It will then forward the approved petition to that consulate.

The approval of this visa petition does not in itself grant any immigration status and does not guarantee that the alien beneficiary will subsequently be found to be eligible for a visa, for admission to the United States, or for an extension, change, or adjustment of status.

THIS FORM IS NOT A VISA NOR MAY IT BE USED IN PLACE OF A VISA.

Please see the additional information on the back. You will be notified separately about any other cases you filed.

IMMIGRATION & NATURALIZATION SERVICE
TEXAS SERVICE CENTER
P O BOX 851488 - DEPT A
MESQUITE TX 75185-1488
Customer Service Telephone: (800) 375-5283



THE UNITED STATES OF AMERICA

RECEIPT NUMBER SRC-07-113-50528		CASE TYPE I485 APPLICATION TO ADJUST TO PERMANENT RESIDENT STATUS
RECEIVED DATE February 26, 2007	PRIORITY DATE	APPLICANT A088 260 352 SANCHEZ PULIDO, LAURA
NOTICE DATE March 2, 2007	PAGE 1 of 1	

WILLIAM H. OLTARSH
OLTARSH & ASSOC P C
494 EIGHTH AVE STE 1704
NEW YORK NY 10001

Notice Type: Receipt Notice

Amount received: \$ 1395.00

Section: Other basis for adjustment

Receipt notice - If any of the above information is incorrect, call customer service immediately.

Processing time - Processing times vary by kind of case. You can check our current processing time for this kind of case on our website at www.uscis.gov. On our website you can also sign up to get free e-mail status updates as we complete key processing steps on this case. Most of the time your case is pending the processing status will not change because we will be working on others filed earlier. We will notify you by mail when we make a decision on this case, or if we need something from you. If you move while this case is pending, call customer service when you move. Processing times can change. If you don't get a decision or update from us within our current processing time, check our website or call for an update. If you have questions, check our website or call customer service. Please save this notice, and have it with you if you contact us about this case.

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Always remember to call customer service if you move while your case is pending. If you have a pending I-130 relative petition, also call customer service if you should decide to withdraw your petition or if you become a U.S. citizen.

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IMMIGRATION & NATURALIZATION SERVICE

TEXAS SERVICE CENTER

P O BOX 851488 - DEPT A

MESQUITE TX 75185-1488

Customer Service Telephone: (800) 375-5283





RECEIPT NUMBER SRC-07-113-50538		CASE TYPE I485 APPLICATION TO ADJUST TO PERMANENT RESIDENT STATUS
RECEIVED DATE February 26, 2007	PRIORITY DATE	APPLICANT A088 260 351 BARRAGA SANCHEZ, LAURA S.
NOTICE DATE March 2, 2007	PAGE 1 of 1	
WILLIAM H. OLTARSH OLTARSH & ASSOC P C 494 EIGHTH AVE STE 1704 NEW YORK NY 10001		Notice Type: Receipt Notice Amount received: \$ 225.00 Section: Other basis for adjustment

Receipt notice - If any of the above information is incorrect, call customer service immediately.

Processing time - Processing times vary by kind of case. You can check our current processing time for this kind of case on our website at www.uscis.gov. On our website you can also sign up to get free e-mail status updates as we complete key processing steps on this case. Most of the time your case is pending the processing status will not change because we will be working on others filed earlier. We will notify you by mail when we make a decision on this case, or if we need something from you. If you move while this case is pending, call customer service when you move. Processing times can change. If you don't get a decision or update from us within our current processing time, check our website or call for an update. If you have questions, check our website or call customer service. Please save this notice, and have it with you if you contact us about this case.

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IMMIGRATION & NATURALIZATION SERVICE
TEXAS SERVICE CENTER
P O BOX 851488 - DEPT A
MESQUITE TX 75185-1488
Customer Service Telephone: (800) 375-5283





U.S. Citizenship
and Immigration
Services

PRESENT THIS LETTER AT THE WORTH STREET ENTRANCE

Jose L. BARRAGAN ESTRADA

File Number: A88260353

402 5th Avenue

Date: 5/16/2007

New Rochelle, NY 10801

Please come to the office shown below at the time and place indicated in connection with an official matter.

OFFICE LOCATION	26 FEDERAL PLAZA NEW YORK, NY 10278	Room No. 8-800	Floor No. 8TH
DATE AND HOUR		5/31/2007	9:30:00 AM
ASK FOR	IMMIGRATION EXAMINER		
REASON FOR APPOINTMENT	ADJUSTMENT OF STATUS (NOTE: This notice does not represent a decision on motions in any related matters or prior decisions.)		
BRING WITH YOU	SEE ATTACHMENTS		

IT IS IMPORTANT THAT YOU KEEP THIS APPOINTMENT AND BRING THIS LETTER WITH YOU. IF YOU ARE UNABLE TO DO SO, STATE YOUR REASON, SIGN BELOW AND RETURN THIS LETTER.

WARNING:

IF YOU CONSIDER DEPARTING FROM THE UNITED STATES TO ANY COUNTRY, INCLUDING CANADA OR MEXICO, BEFORE A DECISION IS MADE ON YOUR APPLICATION, CONSULT WITH THIS OFFICE BEFORE DEPARTURE SINCE A DEPARTURE FROM THE UNITED STATES WILL RESULT IN TERMINATION OF YOUR APPLICATION.

I am unable to keep the appointment because:

SIGNATURE

DATE

Attorney Name: William H. Oltarsh
Attorney Address: 494 Eighth Avenue, Ste. 1704
New York, NY 10001-

Very truly yours,

Andrea Quarantillo
District Director - CIS
New York District

*Fingerprint appointment forward to applicant

Exhibit "C"

U.S. Citizenship
and Immigration
Services

PRESENT THIS LETTER AT THE WORTH STREET ENTRANCE

Laura SANCHEZ PULIDO
402 5th Avenue
New Rochelle, NY 10801

File Number: A88260352

Date: 5/16/2007

Please come to the office shown below at the time and place indicated in connection with an official matter.

OFFICE LOCATION	26 FEDERAL PLAZA NEW YORK, NY 10278	Room No. 8-800	Floor No. 8TH
DATE AND HOUR		5/31/2007	9:30:00 AM
ASK FOR	IMMIGRATION EXAMINER		
REASON FOR APPOINTMENT	ADJUSTMENT OF STATUS (NOTE: This notice does not represent a decision on motions in any related matters or prior decisions.)		
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I am unable to keep the appointment because:	
SIGNATURE	DATE

Attorney Name: William H. Oltarsh
Attorney Address: 494 Eighth Avenue
New York, NY 10001-

*Fingerprint appointment forward to applicant.

Very truly yours,

Andrea Quarantillo
District Director - CIS
New York District



U.S. Citizenship
and Immigration
Services

PRESENT THIS LETTER AT THE WORTH STREET ENTRANCE

Laura S. BARRAGAN SANCHEZ

File Number: A88260351

402 5th Avenue

Date: 5/16/2007

New Rochelle, NY 10801

Please come to the office shown below at the time and place indicated in connection with an official matter.

OFFICE LOCATION	26 FEDERAL PLAZA NEW YORK, NY 10278	Room No. 8-800	Floor No. 8TH
DATE AND HOUR		5/31/2007	10:00:00 AM
ASK FOR	IMMIGRATION EXAMINER		
REASON FOR APPOINTMENT	ADJUSTMENT OF STATUS (NOTE: This notice does not represent a decision on motions in any related matters or prior decisions.)		
BRING WITH YOU	SEE ATTACHMENTS		

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I am unable to keep the appointment because:

SIGNATURE

DATE

Very truly yours,

Andrea Quarantillo
District Director - CIS
New York District

Attorney Name: William H. Oltarsh
Attorney Address: 494 Eighth Avenue, Ste. 1704
New York, NY 10001-



494 Eighth Avenue, Suite 1704
New York, NY 10001
Tel: (212) 944-9420
Fax: (212) 944-9120
E-mail: info@oltarsh.com
www.oltarsh.com

June 7, 2007

U.S. Citizenship and Immigration Services
Adjustment of Status Section
26 Federal Plaza
New York, NY 10027

Attn.: DAO Bill Milgrom
Sec. 245
Room 8100

Re: Jose L. Barragan Estrada (A88 260 353)
Laura S. Barragan Sanchez (A88 260 351)

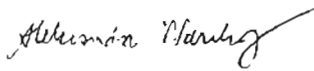
Dear Officer Milgrom:

As per your request, I am enclosing the following evidence showing that Mr. Barragan and Miss. Barragan were physically present in the United States in December of 2000:

1. A copy of two ConEdison bills for months of November, 2000 and December, 2000, with proof of payment dated December 12, 2000;
2. A copy of Verizon bill for period from November 16, 2000 to December 15, 2000, which proof of payment dated December 12, 2000;
3. A copy of two receipts for payment of the rent for November, 2000 and January, 2001;
4. The original letter from Mr. Barragan's employer, Rockledge Scaffold Corp., indicating that Mr. Barragan had been working for the company continuously since April 19, 1997. The letter was signed by Mr. Harrington and his signature was notarized on March 22, 2001;
5. A copy of the Outpatient Clinic Encounter Form indicating that Laura Stefany Barragan attended the pediatric appointment on November 6, 2000.

Thank you for your kind attention,

Very truly yours,


Aleksandra Warchol

2007 JUN -7 PM 2:46
RECEIVED
JUN 11 2007

Exhibit "D"